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No. 91-321

In the Supreme Court of the United States

OCTOBER TERM, 1991

ITEL CONTAINERS INTERNATIONAL CORP., PETITIONER

v.

JOE HUDDLESTON, COMMISSIONER OF REVENUE, STATE OF TENNESSEE, RESPONDENT

On Petition for a Writ of Certiorari to the Supreme Court of Tennessee

PETITIONER'S REPLY BRIEF

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TABLE OF AUTHORITIES

CASES	Page
Sam Carey Lumber Co. v. Sixty-One Cabinet Shop, Inc., 773 S.W.2d 252 (Tenn. Ct. App. 1989)	5, 6
Department of Revenue v. Ass'n of Washington Stevedoring Cos., 435 U.S. 734 (1978)	3, 6
Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979)	2, 4
Long Equipment Co. v. Keeton, 736 S.W.2d 611 (Tenn. Ct. App. 1987)	6
Louisiana Land and Exploration Co. v. Pilot Petroleum Corp., 900 F.2d 816 (5th Cir.), cert. denied, 111 S. Ct. 248 (1990)	4-5, 6
McGoldrick v. Gulf Oil Corp., 309 U.S. 414 (1940)	2, 4
Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976)	5, 6
R.J. Reynolds Tobacco Co. v. Durham County, 479 U.S. 130 (1986)	3
Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69 (1946)	3, 5, 6
Trinova Corp. v. Michigan Department of Treasury, 111 S. Ct. 818 (1991)	3
Vector Co. v. Benson, 491 S.W.2d 612 (Tenn. 1973)	6
Wardair Canada, Inc. v. Dept. of Revenue, 477 U.S. 1 (1986)	1, 2
Xerox Corp. v. County of Harris, 459 U.S. 145 (1982)	1, 2, 4

STATUTES AND REGULATIONS

Tenn. Code Ann. 67-5-602(c) (1)	3
Tenn. Code Ann. 67-6-313(a)	6
Tenn. Code Ann. 67-6-502	5

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PETITIONER'S REPLY BRIEF

In its response, the State does not take issue with *any* of the fundamental propositions that are advanced in the petition. It does not deny that the question whether transaction taxes are inherently immune from challenge under the Foreign Commerce Clause is a recurring and extremely important one that was left open in *Wardair Canada, Inc. v. Dept. of Revenue*, 477 U.S. 1, 13 (1986). It does not deny that its tax poses the risk of multiple taxation, imposes significant burdens on the operation of containers in international commerce, may prompt retaliation by our trading partners, and will raise the costs of imports to and exports from the United States. It does not deny that this Court's decisions in *Xerox Corp. v. Harris County*, 459 U.S. 145 (1982), and

McGoldrick v. Gulf Oil Corp., 309 U.S. 414 (1940), held state taxes preempted in circumstances that are indistinguishable from those in this case. And it does not deny that Itel's containers are imports and exports within the meaning of the Import-Export Clause that were "in transit" at the time of taxation. The State accordingly advances no reason for the Court to decline review of the substantial issues presented here.

1. The State's principal argument sidesteps the point of the petition. The State maintains (Br. in Op. 4-5, 6, 7) that its tax is not measured by the value of the property that is sold or leased, and that the levy accordingly cannot be analogized to a property tax. But even if that statement is correct—and it demonstrably is not, as we explain below—it simply is not responsive to the petition. Our Foreign Commerce Clause argument is not grounded on the proposition that Tennessee's levy *is* a property tax; to the contrary, the first question presented is whether, under *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), there is a necessary constitutional distinction *between* sales and property taxes, as the court below held. See Pet. 10-16.

We think it plain that transaction taxes should not be immune from challenge under the Clause. As we explained in the petition, the Court's reasons for invalidating the property tax at issue in *Japan Line*—concerns about multiple international taxation and interference with federal policy—have nothing to do with the distinction between property and sales taxes. See *Wardair*, 477 U.S. at 18 (Blackmun, J., dissenting). Cf. *Xerox*, 459 U.S. at 153 (for preemption purposes, no "legal difference" between sales and

property taxes); *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 142-143 n.10 (1986) (distinction "of no importance"). The State's conclusory assertion (Br. in Op. 8-9) that the court below "followed the guidelines" announced in *Japan Line* misses the mark; the state court set down a legal rule governing challenges to transaction taxes that is inconsistent with the *Japan Line* analysis. And most fundamentally for present purposes, the State has not offered any reason to doubt that the issue is a significant and recurring one that warrants this Court's attention.

In any event, the State's claim (see Br. in Op. 4-5) that sales and lease taxes are largely unrelated to the value of the underlying property is a nonsensical one that has been flatly rejected by the Court. "[T]he Court ha[s] always considered a tax on the sale of goods to be a tax on the goods themselves. * * * The sale ha[s] no value or significance apart from the goods." *Department of Revenue v. Ass'n of Washington Stevedoring Cos.*, 435 U.S. 734, 756 n.21 (1978).[1] And labeling the tax one on "privilege" or "business activity" (see Br. in Op. 4) "does not permit [the Court] to forgo examination of the actual tax base * * *. 'A tax on sleeping measured by the number of pairs of shoes you have in your closet is a tax on shoes.'" *Trinova Corp. v. Michigan Department of Treasury*, 111 S. Ct. 818, 829 (1991) (citation omitted). Accord *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, 84 (1946).

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[1] If the State means to distinguish taxes on sales from taxes on leases, its contention is belied by one of Tennessee's own methods of valuing personal property for property tax purposes—capitalization of rental income over the life of the property. Tenn. Code Ann. 67-5-602(c)(1).

The State makes no attempt to distinguish these authorities.

2. The State also contends that the Container Conventions are inapplicable here because "[t]he Tennessee tax simply is not levied on imports, but is a generally applicable sales tax." Br. in Op. 7. The assertion that such a distinction is relevant, however, is irreconcilable with this Court's decisions. *Japan Line*, of course, invalidated a generally applicable state tax as inconsistent with the 1956 Convention. See 441 U.S. at 452-453. And as we explain in the petition (at 20-23), the Court in *McGoldrick* and *Xerox* struck down generally applicable state sales and property taxes because they frustrated the federal policies effectuated by the Customs-bonded warehouse statutes—policies that are directly analogous to those advanced by the Container Conventions. Again, the State wholly fails to address these rulings. By the same token, the State does not (and plainly could not) deny either that its tax burdens the use of containers or that our trading partners refrain from imposing equivalent taxes on the lease of containers abroad.[2]

3. Finally, the State's assertion that the decision below does not conflict with *Louisiana Land and Exploration Co. v. Pilot Petroleum Corp.*, 900 F.2d 816 (5th Cir.), cert. denied, 111 S. Ct. 248 (1990), rests on distinctions that are immaterial—and that already have been dismissed as irrelevant by this Court. First, the State notes that the tax at issue in *Louisiana Land* was levied specifically on sales of fuel rather than on all sales. But the Court never has held that a tax must be directed at a specific good to constitute an impost upon imports or exports within the meaning of the Import-Export Clause. To the contrary, in *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, 83 (1946), the Court invalidated a state sales tax directed at all transfers of "tangible personal property at retail." The crucial question thus is whether the levy, *as applied*, constitutes a tax on imports or exports that are in transit when the tax is assessed. See *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 290 (1976).

Second, the State observes that the incidence of the Alabama tax at issue in *Louisiana Land* fell on the purchaser and suggests that the incidence here falls on the seller or lessor. In their practical operation, however, the taxes at issue here and in *Louisiana Land* operate in precisely the same way: Tennessee law requires that the sales tax be separately stated on the consumer's bill and that it "be collected by the retailer from the consumer insofar as it can be done." Tenn. Code Ann. 67-6-502.[3] In any event, the State's argument, even if factually grounded, would not distinguish *Richfield*, where the Court invalidated a

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[2] The State similarly asserts that the Container Conventions "do not even address, much less forbid, Tennessee's sales tax." Br. in Op. 7. That is not true; by their plain terms, both Conventions set aside "all" taxes imposed by reason of importation. In any event, the State's observation distinguishes neither *Japan Line* (which concerned a tax that was no more "addressed" by the 1956 Convention than is the Tennessee levy) nor *McGoldrick* and *Xerox*, which held general state taxes preempted by federal laws that in terms forbade the imposition only of Customs duties. See Pet. 20-21.

[3] "[T]he burden for the payment of the [sales] tax is meant to be that of the buyer" (*Sam Carey Lumber Co. v. Sixty-One Cabinet Shop, Inc.*, 773 S.W.2d 252, 255 (Tenn. Ct. App. 1989)); if the tax is not collected at the time of sale, either

state tax "levied on retailers" who in turn were "authorized to collect the tax from the consumers." 329 U.S. at 83. Because the State does not (and could not) deny that the goods subject to tax here are in transit and qualify as imports or exports, this case, like *Louisiana Land*, squarely presents the question reserved in *Michelin* and *Washington Stevedoring*: whether such a tax violates the Import-Export Clause. See Pet. 24-25.[4]

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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the State or the seller may later collect the tax from the buyer. See *ibid.*; *Long Equipment Co. v. Keeton*, 736 S.W.2d 611, 613 (Tenn. Ct. App. 1987).

[4] The State asserts that, under its "import-for-export" exemption, Tenn. Code Ann. 67-6-313(a), it would not tax containers that Itel itself brought into and then (without an intervening transfer to a lessee) exported from the State. Br. in Op. 6. In fact, that statute provides no greater protection to interstate and foreign commerce than does the United States Constitution. See *Vector Co. v. Benson*, 491 S.W.2d 612 (Tenn. 1973). In any event, the State's repeated assertion that certain containers escape taxation (Br. in Op. 6, 7) is beside the point; that cannot justify unconstitutional levies on the transfer of containers in Tennessee.